BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22418

NORTHWEST VIDEO, INC.,
FLATHEAD LAKE CABLE TV, INC.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and the UNITED STATES OF AMERICA,
Respondents,

KMSO-TV, INC.,
Intervenor.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

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BRIEF FOR RESPONDENTS

JURISDICTIONAL STATEMENT

This joint petition for review was filed pursuant to Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. 402(a), and Sections 2 and 3 of the Judicial Review Act, 28 U.S.C. 2342 and 2343.

The appeal arises from a memorandum opinion and order of the Federal Communications Commission, released November 17, 1967, which in pertinent part denied petitioners' request for waiver of Sections 21.712 and 74.1103 of the Commission's Rules (R. 155-182). These rules govern the rights of television broadcast

and translator stations to program exclusivity vis-a-vis CATV systems operating in their service areas. Because petitioners' statement of the case is argumentative and somewhat incomplete, the following counterstatement is submitted for the Court's assistan

COUNTERSTATEMENT OF THE CASE

1. Background

Although petitioners challenge the Commission's jurisdicti to regulate CATV, we will not set out the entire background of CATV regulation or the bases of jurisdiction since this Court is currently confronted with this issue in other pending cases and is therefore familiar with the subject matter. Total Telecable, Inc v. F.C.C., Case No. 21990; Valley Vision, Inc. v. F.C.C., Case Nos. 21869, 21870 and 21870-A. See also Southwestern Cable Co. v. F.C.C., 378 F.2d 118 (C.A. 9, 1967), cert. granted, 389 U.S. 911 (1967). In addition, petitioners do not treat this issue in their brief, choosing instead to rely on the arguments made by the petitioner in Case No. 22393, Great Falls Community TV Cable Co. v. F.C.C.[1/] We will, however, set forth the principal considerations which led to the adoption of the program exclusivity, or "non-duplica rule, the provision mainly at issue in this proceeding.

In the First Report and Order (38 F.C.C. 683) the Commission, after considering its statutory responsibilities,

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1/ The petitioners in both cases have requested a consolidated oral argument.

noted that the commercial television system is based upon the distribution of programs to the public through a multiplicity of local station outlets, and that this policy had been recently reaffirmed by the Congress (38 F.C.C. 697-700, pars. 40-47). It found that CATV, while useful as an auxiliary service, must have a complementary role to the television broadcast station--not substitutionary or conflicting--for the following reasons (38 F.C.C. 699, pars. 44-45):

(1) The CATV cannot serve many persons reached by television broadcast signals because of the prohibitive costs of extending cable beyond heavily built-up areas. This means that people living outside the built-up areas and those who cannot afford or do not wish to pay are entirely dependent upon local stations for television service. Primary reliance cannot therefore be placed on the CATV since it is a "service which, technically, cannot be made available to many others."

(2) The local station serves as an outlet for community self-expression, presenting programming designed to serve the needs and interests of the local area. Conversely, very few CATV systems originate any local programming.

Having concluded that CATV serves the public interest "when it acts as a supplement rather than a substitute for off-the-air television service" (38 F.C.C. 701, par. 48), the

Commission turned to the basic conditions under which competition between the CATV and the local television station occurs (38 F.C.C. 701-706, pars. 49-57).[2/] It found that the competition was marked by two features not present in the ordinary competition between broadcast stations, which were both unfair and inconsistent with the CATV's proper role as a supplementary service.

First, the Commission found, upon analysis, that the CATV which fails to carry the local station on its system has in practical effect cut off the station from access to the CATV subscriber (38 F.C.C. 702-703, par. 51). Second, the Commission noted that there has been built up, under both the Communications Act and the antitrust laws, a reasonable amount of exclusivity on the exhibition of TV programs within the station's market and for a particular time period (38 F.C.C. 703-704, pars. 52-53). The CATV, however, presently stands outside the established program distribution process, and brings into a local station's area the programs of distant stations, irrespective of the reasonable exclusivity which the local station has bargained for in the competitive TV market.[3/]

In addition to the above considerations, the Commission considered the question of the impact of CATV competition on the development of television broadcasting service (38 F.C.C. 706-713,

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2/ The two compete because when a cable system brings to a station's market additional signals which would not be readily available in the system's absence, it introduces competition for audience attention--and audience attention is the basic commodity that a station sells to advertisers. 38 F.C.C. 702, par. 50.

3/ Cf. United Artists Television, Inc. v. Fortnightly Corporation, 255 F. Supp. 177, 180 (D.C.S.D.N.Y. 1966), affirmed 377 F.2d 872 (C.A. 2, 1967), cert. granted, 36 U. S. Law Week 3226 (1967).

pars. 58-75). In doing so, it analyzed the economic data which had been presented and took into account information which had been acquired in case-to-case adjudication (38 F.C.C. 708-711, pars. 64, 68-69). Noting the explosive growth of CATV and its changing nature (38 F.C.C. 709, par. 65), as well as the increasing penetration of television stations' service areas (38 F.C.C. 709-710, pars. 66-67), the Commission concluded that remedial action was warranted (38 F.C.C. 713-15, pars. 76-79):

> * * * We believe that the imposition of minimum carriage and nonduplication requirements by rule is required in order to ameliorate the adverse impact of CATV competition upon local stations, existing and potential. * * * Corrective action after the damage has already been done, if not too late, is certainly much more difficult. * * * This is one of those situations in which the public interest requires that conditions conducive to the sound future of television 'be assured rather than left uncertain.' United States v. Detroit Navigation Co., 326 U.S. 236, 241. This is particularly so where we have two modes of service, one of which is almost completely dependent on the other for its product. In such circumstances, uncertainties should be resolved In favor of ensuring the healthy growth and maintenance of the basic service.

As a result of all these considerations, the Commission adopted Section 21.712, 47 CFR 21.712, its carriage and nonduplication rules for microwave-served CATV systems.[4/] The need for such rules

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4/ Section 74.1103 is the corresponding rule for non-microwave-served CATV systems. The two rules are identical in substance. Section 21.7 is the more relevant rule in this case since both CATV systems are microwave-served. References hereafter will be to Section 21.712 only

was reaffirmed in the Second Report and Order (2 F.C.C. 2d at 745-56, pars. 47-75) where the Commission broadened the scope of the regulations to include all CATV systems, finding them "essential to insure that CATV continues to perform its valuable supplementary role without unduly damaging or impeding the growth of television broadcast service" (2 F.C.C. 2d at 746, par. 47).

Section 21.712 of the Rules provides that a CATV system will be required upon request and within the limits of its channel capacity, to carry without material degradation the signals of all local television stations within whose grade B service area[5/] the CATV system is located, in order of priority of signal grade.[6/]

In addition, and more relevant to this appeal, the rule provides that a CATV system will be required, upon request, to avoid duplication of the programs of local television stations carried on the system during the same day that such programs are broadcast by the local stations. This nonduplication protection

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5/ The Commission classifies television service areas into two grade "Grade A service is so specified that a quality acceptable to the median observer is expected to be available for at least 90% of the time at the best 70% of receiver locations at the outer limits of this service. In the case of Grade B service, the figures are 90% of the time and 50% of the locations." Sixth Report and Order, 1 Pike & Fischer, R.R. 91:601 at 630 (1952). Cf., Clarksburg Publishing Co. v. F.C.C., 96 U.S. App. D.C. 211, 215-216 n. 12, 225 F.2d 511, 515-16 n. 12 (1955).

6/ Under the rule, television signals are divided into four priorities: (1) principal community, (2) Grade A, (3) Grade B, and (4) translator stations.

applies to "prime time" network programs (i.e., those presented by the network between 6 p.m. and 11 p.m.) only if such programs are presented by the local station entirely within what is locally considered to be "prime time". Furthermore, a local station is only entitled to nonduplication protection on a cable system "against lower priority or more distant duplicating signals, but not against signals of equal priority * * *." Section 21.712(g). Finally, the CATV system need not delete reception of a network program, if in doing so, it would leave available for reception of subscribers, at any time, less than the programs of two networks, or would deprive them of color reception of the program. Section 21.712(i). 7/

7/ The substance of Section 21.712 has been reviewed and upheld as a lawful and reasonable exercise of authority. See, e.g., Buckeye Cablevision, Inc. v. F.C.C., 387 F.2d 320, (D.C. Cir., 1967); Carter Mountain Transmission Corp. v. F.C.C.,321 F.2d 359 (C.A.D.C. 1963), cert. den. 375 U.S. 951; Idaho Microwave, Inc. v. F.C.C., 352 F.2d 729 (C.A.D.C. 1965); Wheeling Antenna Company, Inc. v. U.S.A. and F.C.C., ___ F.2d ___, (C.A. 4, decided February 28, 1968); Conley Electronics Corp. v. F.C.C., ___ F.2d ___, (C.A. 10, decided April 22, 1968).

2. The Present Proceeding

Petitioners are commonly-owned CATV systems. Northwest Video operates a system in Kalispell, Montana, and several nearby small communities and subdivisions. Flathead Lake Cable operates a system in Polson, Montana. Northwest Video carries five signals on its system:[8] three network stations from Spokane, Washington, one Canadian station, and KGVO-TV, Missoula, Montana, as rebroadcast by translator station KØ9HA in Kalispell.[9] All of the signals, except KGVO-TV, are received via microwave. On May 12, 1966, pursuant to Sections 21.712 and 74.1103 of the Rules, KMSO-TV, Inc., licensee of KGVO-TV and KØ9HA, requested non-duplication protection from Northwest Video.[10] Northwest Video did not comply, instead filing a petition for waiver of the rules with the Commission on June 17, 1966.

Flathead Lake Cable's system receives and carries the same signals as does Northwest Video except that KGVO-TV is received via a 1-watt translator in Polson. On March 30, 1967, KMSO-TV requested non-duplication protection for KGVO-TV.[11]

8/ In another part of the decision under review, the Commission granted the application of Western Microwave, Inc. to provide three Salt Lake City television signals to Northwest Video's Kalispell CATV system.

9/ An application was on file with the Commission to replace the translator with a satellite broadcast station (BPCT-3985). This application was granted on December 20, 1967 (Public Notice Mimeo No. 10310).

10/ KØ9HA, as a 100-watt translator station, is entitled to a priority under Section 21.712.

11/ KSVO-TV's priority under Section 21.712 stems from the fact that its Grade B contour covers Polson.

Flathead Lake Cable also did not comply, choosing instead to request a waiver of the rule on April 17, 1967.

In a Memorandum Opinion and Order released November 17, 1967, the Commission denied both waiver requests and gave petitioners 30 days to comply (R. 155-182). In both cases the Commission found petitioners' allegations either irrelevant or unsupported (R. 170, 172). The result of this decision is that petitioners would have to delete any program emanating from the four distant stations if that program was being broadcast by KGVO-TV during prime-time on the same day. The subscribers to the CATV systems would not lose a single program. In addition, no one Spokane signal would be deleted all of the time because KGVO-TV broadcasts programs from all three networks. 12/

Petitioners duly filed a joint petition for review of the above action. They also requested that the effect of the Commission's decision be stayed pendente lite. On January 10, 1968, this Court granted the stay request pending disposition of the petition for review.

12/ The Canadian station and KGVO-TV apparently have no programs in common.

QUESTIONS PRESENTED

Respondents believe that a threshold question presented by this appeal is:

Whether Section 405 of the Communications Act, 47 U.S.C. 405 bars review of petitioners' claims of error since they were not raised before the Commission.

If the Court should find that the issues raised by petitioners are properly before it, we believe the questions presented may be stated as follows:

Whether the Commission has the authority to require that CATV systems which are served by FCC-licensed microwave facilities must, in order to receive that service, afford nonduplication to local stations.

Whether the nonduplication provision is an unconstitutional restriction on free speech.

Whether the nonduplication rule is reasonably related to the public interest standard of the Communications Act.

Whether an evidentiary hearing was required on petitioners' request for a waiver of the rule.

ARGUMENT

Petitioners have chosen not to brief certain arguments which were raised in the petition for review. Instead they have adopted the brief of petitioner Great Falls Community TV Cable Co., Inc. in Case No. 22393 in this regard. Accordingly, rather than duplicate our response, we will adopt the arguments made in our brief in Case No. 22393 as to those issues. The issues in question involve the Commission's jurisdiction over CATV (both microwave-served and off-the-air), the nonduplication rule versus freedom of speech, and whether the rule is a restraint of trade.

Like petitioner in the Great Falls case, petitioners here did not raise any of these issues before the Commission. Thus, like Great Falls, they are precluded by statute from raising them now. Section 405 of the Communications Act, 47 U.S.C. 405, states that no "question of fact or law" may be raised on appeal which a petitioner has not first raised before the Commission. The decisions of the courts support the proposition that questions of fact or law which are raised for the first time on appeal will not be considered. Unemployment Commission v. Aragon, 329 U.S. 143 (1946); United States v. Tucker Truck Lines, 344 U.S. 33 (1952); Albertson v. F.C.C., 243 F.2d 209 (C.A.D.C. 1957); Florida Gulfcoast Broadcasters v. F.C.C., 352 F.2d 726 (C.A.D.C. 1965). See also the recent application of Section 405 by the First Circuit

in Presque Isle TV Co. v. United States, 387 F.2d 502 (C.A. 1, 1967), wherein petitioner had sought a waiver of a CATV rule without challenging the Commission's jurisdiction, and the court upheld the Commission's claim that the jurisdiction issue was not properly before it.

Likewise, the one issue which petitioners here have briefed, whether a hearing was required on the waiver requests, was not raised before the Commission. The papers before the agency make no reference whatever to the need for a hearing, either as a matter of law or because of the particular facts of these cases. Accordingly in light of 47 U.S.C. 405 and the cases cited above, we submit that this issue is not properly before the Court and may not be considered. See also Western Airlines v. C.A.B., 196 F.2d 993 (C.A. 9, 1952). The following argument, in which we show that in any event no hearing was necessary on petitioners' waiver request, assumes arguendo that the issue was properly raised.

I. THE COMMISSION PROPERLY DECLINED TO HOLD A HEARING ON PETITIONERS' REQUESTS FOR WAIVERS OF THE NONDUPLICATION RULE.

Petitioners' argument that the Commission erred in denying their petitions for waiver without an evidentiary hearing is divided into three parts: (1) the failure to hold a hearing is a denial of due process under the Fifth Amendment; (2) certain provisions of the Communications Act require a hearing; and (3) apart from legal considerations, petitioners' waiver showings raised factual disputes sufficient to warrant a hearing. We will deal with these sub-arguments seriatim.

A. Denial Of A Hearing Did Not Deprive Petitioner Of Due Process Of Law.

Initially petitioners make the broad claim that a hearing is required as a matter of due process of law since the issuance of the order to comply with the rules disrupts existing arrangements, depriving petitioners of the full use of their property.

As we have discussed above, the nonduplication rule is designed to carry out the valid objective of imposing upon CATV systems that degree of regulation which will insure that CATV service will be of maximum benefit in distributing television signals to the American public without destroying the basic television service which gives them their substance. This rule was adopted after a proceeding which complied fully with the procedural requirements of the Administrative Procedure Act, 5 U.S.C.

The law is well settled that in such circumstances individuals subject to governmental regulation may constitutionally

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13/ With respect to regulatory efforts of the Commission's predecessor, the Federal Radio Commission, the Supreme Court stated:

> * * * This Court has had frequent occasion to observe that the power of Congress in the regulation of interstate commerce is not fettered by the necessity of maintaining existing arrangements which would conflict with the execution of its policy, as such a restriction would place the regulation in the hands of private individuals and withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their enterprises. Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co., 289 U.S. 266, 282 (1933)

be deprived of certain property rights without the necessity for individual adjudication of their claims. See e.g., Airline Pilots Association, Int'l v. Quesada, 276 F.2d 892 (2nd Cir., 1960). In that case the Court was faced with an argument similar to that made here. The Federal Aviation administrator had promulgated after a rulemaking only, a new rule barring individuals over 60 years old from serving as pilots. Many pilots were thereby deprived not of a portion of their business investment, but rather of their basic livelihood. Said the Court:

> Nor does the regulation violate due process because it modified pilots' rights without affording each certificate holder a hearing. Administrative regulations often limit in the public interest the use that persons may make of their property without affording each one affected an opportunity to present evidence upon the fairness of the regulation. * * * Obviously, unless the incidental limitations upon the use of airmen's certificates were subject to modification by general rules, the conduct of the Administrator's business would be subject to intolerable burdens which might well render it impossible for him effectively to discharge his duties. All changes in certificates would be subject to adjudicatory hearings including appeals to the courts, and each pilot whose license was affected -- here some 18,000 -- might demand to be heard individually. 276 F.2d at 896.

This reasoning has been recently applied by the Tenth Circuit in a case on all fours with the one at bar. Conley Electronics Corp. v. F.C.C., __ F.2d __, decided April 22, 1968. There a CATV system contested on due process grounds the Commission's denial without hearing of a waiver request. Quoting the above language from Airline Pilots the Court concluded that due process

did not require a hearing before a CATV system could be ordered to afford nonduplication protection in accordance with a duly adopted agency rule. See also Bi-Metallic Investment Co. v. State Board, 239 U.S. 441, 445 (1915); Willapoint Oysters v. Ewing, 174 F.2d 676 (9th Cir., 1949), cert. denied 338 U.S. 860.

In sum since petitioners had every procedural opportunity to which they were entitled in a valid rulemaking proceeding, they were not deprived of any constitutional rights of due process of law.

B. Petitioners Had No Statutory Right To A Hearing.

Petitioners next argue that they were entitled to a hearing as a matter of statutory right. In so arguing petitioners misread the cited statutory provisions of the Communications Act and the Administrative Procedure Act. As noted before, the non-duplication rule was originally adopted as the result of a rule-making proceeding in which all interested parties were permitted to participate. See First Report and Order, 38 F.C.C. 683 (1965). After further proceedings in which notice and opportunity to comment were given to interested parties, the rule was changed so as to reduce the 15 day duplication ban to a prohibition against duplication within a 24 hour period. Second Report and Order, supra Petitioners allege no irregularities with respect to the procedures followed by the Commission in adopting this rule, and, in fact, these proceedings have been expressly upheld by the Court of Appeals for the District of Columbia Circuit in Buckeye Cablevision, Inc. v. F.C.C., 387 F.2d 320, (D.C. Cir., 1967).

The asserted statutory basis for a hearing stems from the following provisions of the Communications Act: §309(e), which provides for a hearing upon any application for a license where there exists a substantial and material question of fact; §303(m)(2), which requires a hearing prior to the suspension of an

operator's license; §312(c), which provides for a hearing prior to revocation of a license; and §316, which bars any modification of a license without a hearing. Dealing with precisely the same argument that petitioners make here, the Tenth Circuit stated in Conley, supra: "The short answer is that [petitioner], by its own admission, is neither an applicant for a license nor a licensee. It is clear, therefore, that the various statutory provisions relied upon are inapplicable by their own terms." 14/

14/ Elsewhere in their brief, petitioners seem to contend that the Commission's order was actually a cease and desist order within the meaning of Section 312(b) and that a show cause proceeding pursuant to that section was required. Under Section 312 the Commission may issue cease and desist orders to any person failing "to observe any rule or regulation of the Commission" authorized under the Act. A cease and desist order may be entered only after a hearing in which the person involved has been afforded an opportunity to show cause why the order should not be issued. And the proceedings are reviewable only in the Court of Appeals for the District of Columbia Circuit, 47 U.S.C. 402(b)(7).

Here the Commission did not purport to act under Section 312, nor did it even hold that its rules had been violated. It simply had before it a petition for waiver of one of its rules filed by petitioner. The waiver procedure is set forth in considerable detail in Section 74.1109 of the rules and the Commission's action was taken pursuant to and in accordance with the procedures specified therein. A petition for waiver operates to stay compliance pending a determination of the merits of the waiver request.

While the Commission's order contained a clause directing petitioners to comply with the rule within thirty days, that clause was inserted only to give petitioners notice of a date certain when they would be expected to be in compliance with the rule; aside from this the ordering clause added nothing to the obligation imposed on petitioners. And once the waiver was denied, it was the rule itself, adopted after proceedings in which petitioners had a full opportunity to participate, which compelled the nonduplication protection at issue here. "Rather than a cease and desist order, we think the Commission's order was merely a directive giving . . . notice of a date certain when it would be expected to be in compliance with the nonduplication rule." Conley Electronics Corp. v. F.C.C., supra.

However, even if petitioners fell within the terms of these provisions, it is clear that they do not require an evidentiary hearing under the present circumstances. For here, petitioners are simply being required to comply with duly adopted rules, of future effect only, and applicable to nearly all of the hundreds of CATV systems throughout the country. It is well settled that even where existing statutes afforded individual parties a hearing before existing rights can be changed, no such hearings are needed before general rules can be applied. See Federal Power Commission v. Texaco, 377 U.S. 33 (1964); United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); California Citizens Band Association, Inc. v. U.S., 375 F.2d 43 (9th Cir., 1967), cert. denied ___ U.S. ___; American Airlines v. Civil Aeronautics Board, 359 F.2 624 (D.C. Cir., 1966), cert. denied, 385 U.S. 843 (1966); and Airline Pilots Association, International v. Quesada, 276 F.2d 892 (2nd Cir., 1960). The statutory references and cases cited in petitioners' brief are not in point because they are addressed to situations in which individuals are singled out for unique treatment.

The foregoing principle has been followed in cases arising from the Commission's refusal to waive its CATV rules. Dealing with essentially the same kind of claim being asserted here, the Fourth

Circuit stated (Wheeling Antenna Company, Inc., supra, slip opinion, p. 6):

> At its option the Commission may, as it did here, adjudicate by reference to a pertinent general rule. Cf. Securities Comm'n v. Chenery Corp., 332 US 194, 203 (1947). In the present circumstances no hearing was demandable. FPC v. Texaco Inc., 377 US 33, 44 (1964); United States v. Storer Broadcasting Co., 351 US 192, 205 (1956). Otherwise, the Commission would be intolerably and impractically embroiled in a multiplicity of trials. This does not mean, of course, that a petitioner goes unheard. It means only that the Commission may make its judgment on the petitioner's papers. The decision then becomes reviewable in whatever manner the statute may permit.

Similarly in the Conley case the Court, relying on the authorities cited above, concluded that no hearing was required by statute on the waiver request.

These cases are we submit dispositive of petitioners' claim that they have a statutory right to a hearing. We show in the following section, that under the particular facts of this case it was well within the Commission's discretion to resolve the waiver question on the basis of the papers submitted.

C. The Showing Contained In Petitioners' Waiver Requests Were Inadequate To Justify A Departure From The Nonduplication Rule.

We pointed out in the opening section of our brief that petitioners never requested a hearing on their waiver request, and that for this reason they are foreclosed as a matter of law from arguing the question on review, 47 U.S.C. 405. But aside from this we submit that as a practical matter petitioners are in a thoroughly untenable position in asserting the need for a hearing now. For if no hearing were requested how can it be argued that the agency acted unreasonably in refusing to grant one? Cf. New England Air Express, Inc. v. C.A.B., 194 F.2d 894 (C.A.D.C. 1952); Western Airlines v. C.A.B., 196 F.2d 993 (C.A. 9, 1952). If the matter were one of Constitutional or statutory right perhaps it could be argued that no request was necessary. But as we have shown no such right exists. Moreover the section of the Commission' rules which deals with requests for waiver of the CATV rules requires that the petition "shall state the relief requested" and provides for the submission of alternate requests for relief. 47 CFR 74.1109(c)(1). Petitioners' failure to ask for a hearing militates strongly, we submit, against the grant of such relief now.

Wholly aside from this, however, it is clear that the record below amply supports the Commission's denial without hearing of the waiver request. In United States v. Storer Broadcasting Co,

351 U.S. 192 (1956), the Supreme Court set forth the appropriate standard for judging requests for waiver of agency rules:

> As the Commission has promulgated its rules after extensive administrative hearings, it is necessary for the accompanying papers to set forth reasons, sufficient if true, to justify a change or waiver of the rules. We do not think Congress intended the Commission to waste time on applications that do not state a valid basis for hearing. 351 U.S. 192 at 205.

See also Federal Power Commission v. Texaco, Inc., 377 U.S. 33 (1964).

Section 74.1109(c)(1), 47 CFR 74.1109(c)(1), providing for waivers of the CATV rules, specifies that the showing in justification thereof must be substantial:

> [The petition] shall state fully and precisely all pertinent facts and considerations relied upon to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest. Factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

In a recent CATV case involving waiver of a section of the rules (not involved here) which required hearings before certain signals could be carried by CATVs, the Court of Appeals for the District of Columbia Circuit observed that waiver petitions must meet a high evidentiary standard: "We do suggest, however, that in the emerging field of CATV, with respect to petitions for waiver of evidentiary hearings, the Commission should require greater factual specificity in petitions for waiver and in the

proof * * *." Channel 9 Syracuse, Inc. v. F.C.C., 385 F.2d 969, 975 (1967).[14a] These considerations apply even more strongly to the present case, since waiver is being sought, not of a hearing requirement, but of a substantive rule which represents a settled determination as to where the public interest lies.

Petitioners state (Br. p. 13, pp.22-23) that their showing as to alleged deficiencies in the signal of KGVO-TV in the Kalispell and Polson areas justified duplication of the station's programs from other sources. In support of this contention it was alleged that the programming which KGVO-TV rebroadcast from Spokane was received through a tortuous and complex process which caused degradation of the signal. We submit, however, that the record affords ample basis for the Commission's conclusion that the presence of the KGVO-TV signal in the area is sufficiently strong to require adherence by the systems to the nonduplication rule.

In the first place, even if true, this allegation would not warrant a departure from the rule because less than one-quarter of the station's programming is received in the manner described by petitioners (R. 106). The rest is either locally originated or received from Salt Lake City via microwave. No allegations

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14a/ See also Cedar Rapids Television Co. v. F.C.C., __ U.S. App. D.C. __, 387 F.2d 228 (1967).

were made that this programming resulted in an inferior signal.[15/]

As to KØ9HA's signal itself, this translator is licensed to Kalispell and has been in operation for over two years. There have been no complaints about the quality of its signal and in fact favorable comments abound (R. 28-42). The elaborate transmission and retransmission of broadcast signals by wire and microwave over vast distances is, moreover, commonplace in today's communications technology. Signals are carried across the country by devices not unlike those described by petitioners, yet no objectionable degradation occurs. Moreover, the record shows that advertisers regularly buy time on the station to reach viewers in Kalispell and the neighboring communities served by this station.[16/]

Flathead Lake Cable's waiver request made the same allegations as Northwest Video plus the argument that compliance with the nonduplication rule would alter viewing habits since protection

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15/ Cf. Wheeling Antenna Co. v. U.S., supra, where the local station served only 20% of the community with a viewable signal. The Court nevertheless upheld the Commission's judgment that nonduplication protection was warranted.

16/ Furthermore, this entire signal quality matter is being independently obviated by the advent of a regular television broadcasting station in Kalispell which will replace the translator. On December 20, 1967, KMSO-TV, Inc., the licensee of KGVO-TV and KØ9HA, received a construction permit to build a new television station. About 90% of its programming will be received from KGVO-TV.

would involve programming from two different time zones. As for the time zone allegation, the Commission held that "program exclusivity from adjoining time zones is, rather than grounds for waiver, an objective of the same-day program exclusivity requirement." (R. 172) (See also R. 166.) The Commission's discussion of this facet of nonduplication in the Second Report and Order, 2 F.C.C. 2d at 749, para. 56, clearly shows that the facts presented by this case, far from warranting an exemption, constitute a classic illustration of the kind of situation the rule was intended to remedy.

As to the signal strength of the Polson facility, what we have said above regarding Kalispell is equally applicable here. Moreover, it is undisputed that Polson falls within KGVO-TV's predicted Grade B contour. Where this is so, the Commission has held that a waiver will be considered only on a showing that the actual contour as determined by field intensity measurements does not encompass the community where the system is located. Amendment to CATV Rules, 6 F.C.C. 2d 309, 313, (1967). No such showing was submitted here.

There remains petitioners' reliance on the Presque Isle case.[17/] There the Court remanded a Commission decision on the ground that it did not set forth reasons for the action taken. The question of a hearing vel non was not decided, and accordingly

17/ Presque Isle TV Co. Inc. v. U.S., 387 F.2d 502 (C.A. 1, 1967).

the case is inapposite.

Factually, moreover, Presque Isle is quite unlike the present case. There the local station asked for ad hoc 15-day non-duplication protection against a Canadian station which pre-releases network programs several days in advance of the United States showing. If the Canadian station were in the United States, it would have had priority under the non-duplication rule because its signal is equal to or stronger than the local station in the CATV community.[18/] The situation was one that was simply not covered by the rule, so the station requested and received extraordinary ad hoc relief. Under these circumstances the Court held that it was incumbent on the Commission to specify in greater detail the reasons for its action.

On the other hand the present case is exactly like the Wheeling and Conley cases already cited where the local stations requested and received the protection to which the Commission's rules entitled them. A major issue on appeal in each case was whether a hearing should be held, and in each instance the argument was rejected by the Court. Distinguishing Presque Isle, the Court in Wheeling stated (at footnote 6):

> Presque Isle Co. v. FCC, ___ F.2d ___ (1st Cir. 1967), urged by WACO, is inapposite. There the Court remanded a case decided in a summary fashion by the FCC. That case, unlike this one, presented a fact situation which did not fit within the explicit terms of the rules.

18/ See Northern Microwave Service, Inc., FCC 68-322, released March 22, 1968, para. 11.

Under the Communications Act Congress has left largely to the Commission's discretion "the determination of the manner of conducting its business which would most fairly and reasonably accommodate" the proper dispatch of its business and the ends of justice. F.C.C. v. WJR, 337 U.S. 265, 282 (1949); see also 47 U.S.C. 154(j). We submit that no abuse of that discretion has been shown.

CONCLUSION

For the reasons stated, the Commission's action should be affirmed.

Respectfully submitted,

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April 29, 1968

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Stuart F. Feldstein

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April 26, 1968

Mr. William B. Luck, Clerk
United States Court of Appeals
for the Ninth Circuit
7th and Mission Streets
P. O. Box 547
San Francisco, California 94101

Dear Mr. Luck:

On behalf of KMOS, Inc., Intervenor in Case Number 22418, Northwest Video, Inc. and Flathead Lake Cable TV, Inc. v. Federal Communications Commission and United States of America, I wish to advise the Court that the Intervenor is not filing its own Brief in this proceeding, but is adopting the Brief being filed by the Federal Communications Commission and the United States of America.

Respectfully submitted,

Ben C. Fisher
Attorney for KMOS, Inc.

BCF:bf

CITY OF WASHINGTON)
) ss:
DISTRICT OF COLUMBIA)

Ben C. Fisher, being first duly sworn, deposes and says that pursuant to Rule 18 of the United States Court of Appeals for the Ninth Circuit, copies of the foregoing letter were mailed postage prepaid, by first-class mail on April 26, 1968, to the following:

Howard Shapiro, Esquire
Acting Chief, Appellate Section
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